STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2003
v	No. 232634 Genesee Circuit Court
JODY LYNN WELLS, Defendant-Appellant.	LC No. 00-006041-FC

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, in connection with the strangulation death of his wife. He was sentenced to the mandatory term of life imprisonment without parole. He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred by admitting his statement, "I killed my wife," that was allegedly made to a guard at a holding facility following defendant's arrest. He contends that the statement was inadmissible because it was made without the benefit of *Miranda*[1] warnings. This Court reviews evidentiary issues for an abuse of discretion. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996).

At a pretrial evidentiary hearing, guard Darcie Burch testified that she was performing her routine rounds when she heard a man causing a disturbance in cellblock G. Defendant was also being detained in cellblock G, but was not the person causing the disturbance. When Burch walked by defendant's cell to investigate the disturbance in an adjoining cell, she recognized defendant, who had previously lived in her neighborhood. Burch said to defendant, "Hey," whereupon defendant responded, "I killed my wife." Because defendant's response to Burch's salutation was a spontaneous utterance, and not a statement made pursuant to police interrogation, *Miranda* warnings were not required. See *People v Armendarez*, 188 Mich App 61, 73; 468 NW2d 893 (1988). The trial court did not abuse its discretion in admitting the statement.

[1] *Miranda v Arizona*, 384 US 486; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

II

Defendant argues that the prosecutor failed to provide timely discovery. We disagree.

Upon request, a prosecutor must provide a defendant with any exculpatory information or evidence known to the prosecutor, police reports concerning the case, and any written or recorded statements by a defendant, among other things. MCR 6.201(B); *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997). In addition, even absent a request, due process requires the disclosure of evidence in the prosecutor's possession that is exculpatory and material. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). To establish a violation of the due process right to the disclosure of information under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), a defendant must show: (1) that the state possessed information favorable to him; (2) that he did not possess the evidence and could not have obtained it with reasonable diligence; (3) that the prosecutor suppressed the evidence; and (4) that if the evidence had been disclosed to him, it is reasonably probable that the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the result. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).

The record discloses that the prosecutor provided discovery in a timely fashion. First, at a pretrial hearing on July 10, 2000, the prosecutor informed the trial court and defense counsel that he had provided the defense with all information available to the prosecution. Defense counsel complained that he did not receive the names of the inmates who were in close proximity to defendant when he was being held at the detention facility when he stated to Burch that he had killed his wife. At the pretrial evidentiary hearing, however, the prosecutor stated that defendant had received all available information about the names of individuals in the same cellblock as defendant whom "they could track down." Further, Lieutenant Mata testified that there were three individuals in the same cellblock as defendant and that videotapes of the activity in the cellblocks had been saved and were available to the defense. We find no basis for concluding that the prosecutor failed to comply with defendant's discovery requests regarding defendant's jailhouse statement to Burch.

Defendant also complains that counsel did not receive the autopsy report in a timely fashion. At the evidentiary hearing on August 11, 2000, the prosecutor stated he did not receive the autopsy report until July 11, 2000, and defense counsel acknowledged receiving the report on July 12, 2000. Considering that the trial did not begin until September 12, 2000, we reject defendant's claim that the autopsy report was not timely received.

We also find no merit to defendant's claim that the trial court erred when it ruled that the prosecution was only required to divulge information within its possession, and did not have a duty to provide information that it did not possess, but was within its control, such as police records. Further, the record clearly indicates that the trial court provided defendant with the opportunity to conduct full discovery.

III

Defendant argues that the trial court abused its discretion by admitting testimony from the victim's co-workers concerning statements made by the victim about her relationship with defendant and her decision to divorce him. Defendant argues that the testimony was

inadmissible hearsay and impermissible character evidence under MRE 404 because his character was never placed in issue. Additionally, defendant maintains that the testimony was unfairly prejudicial under MRE 403. We disagree.

The trial court admitted the challenged testimony under MRE 803(3), which provides that the following statements are not excluded by the hearsay rule:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . [.]

The challenged statements were admissible to show marital discord as a motive for murder. In particular, Nadine Bevan testified that the victim told her that defendant would kill her before he would give her a divorce. See *People v Fisher*, 449 Mich 441, 449-450, 452-453; 537 NW2d 577 (1995). The victim's statements about her marital problems were corroborated by witnesses who testified that defendant repeatedly called the victim at work and would sometimes show up unexpectedly at her workplace and follow her. Furthermore, because the evidence of motive was highly relevant, particularly since the proofs were largely circumstantial, MRE 401; *Fisher, supra* at 453, the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice under MRE 403. Accordingly, the trial court did not abuse its discretion in allowing the challenged testimony. See also *People v Ortiz*, 249 Mich App 297, 307; 642 NW2d 417 (2002) (finding no abuse of discretion when the trial court admitted statements made by a murder victim about the defendant's threats).

IV

The trial court did not abuse its discretion by excluding evidence of a personal protection order (PPO) against the victim's former husband. Defendant failed to show that the evidence was relevant where the PPO was issued four years before the victim was killed and there was no evidence linking the victim's former husband to the victim's death. Indeed, there was no evidence that the victim's former husband was even in the state of Michigan at the time the victim was killed. MRE 401 and 402; *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000); *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). The trial court did not abuse its discretion by excluding this evidence.

V

The trial court did not abuse its discretion by prohibiting defendant from presenting an expert witness on police investigations. The admissibility of expert testimony is within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

On September 12, 2000, one week before trial, the prosecutor requested that the trial court not allow defendant to call Roger Bolhouse as an expert in crime scene reconstruction

because the prosecutor had just received notice of this witness. As plaintiff points out, the defense was served with a discovery demand on May 8, 2000, that specifically requested information regarding the names of defense witnesses. The defense did not comply with this request. Moreover, the prosecutor observed that Bolhouse had not even looked at the crime scene evidence and was going to be on vacation for at least one week, so the prosecutor would not be able to discover Bolhouse's proposed testimony until the middle or end of trial. Defense counsel conceded that he did not know "what [Bolhouse] was going to say yet," but would probably know by "the first of next week." The trial court ruled:

> Well, I think you probably should have come before me on a motion asking whether or not you're going to be able to utilize him before you went and spent the money on him, because here we are within a week of trial, and I don't think it would be appropriate to allow him to testify under these circumstances.

Although the trial court ruled that defendant could not call Bolhouse as an expert witness, it reserved ruling whether defendant could call him as a rebuttal witness.

Under the circumstances, the trial court did not abuse its discretion by precluding defendant from presenting Bolhouse as an expert witness. Moreover, contrary to what defendant argues, there is no indication that Bolhouse was subsequently offered as a rebuttal witness. Accordingly, we find no error.

VI

Defendant also claims that there was insufficient evidence to support his first-degree murder conviction and that the verdict was against the great weight of the evidence. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

In determining whether a verdict is against the great weight of the evidence, this Court decides whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

To convict a defendant of first-degree murder, the prosecutor must prove that the killing was intentional and that the act of killing was accompanied by premeditation and deliberation. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Intent and premeditation may be inferred from all the facts and circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987); *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987). Factors that may be considered include the prior relationship of the parties, the

defendant's actions before the killing, the circumstances of the killing, and the defendant's conduct after the victim's death. *Anderson*, *supra*.

Before the victim was killed, she complained to friends and co-workers that defendant was too controlling. Defendant often called the victim at her workplace and repeatedly insisted that she come home. He would sometimes show up at the victim's workplace and follow her around. On the Monday before she was killed, the victim told defendant that she wanted a divorce and she was going to take her youngest child with her. Defendant did not want a divorce and threatened to kill the victim if she took the child.

On the night of April 12, 2000, defendant was not living at the marital home. At 10:00 p.m. that night, the victim and her children went to bed, locking all the doors and windows to the house. During the early morning hours of April 13, 2000, one of the victim's children, Heather Peel, heard the back screen door open. There was no sign of forced entry into the house. Thereafter, neighbors heard defendant's truck leave the driveway. Later in the morning, Heather discovered that her mother had been strangled to death. The victim's body was found in a sleeping position with the bed covers neatly tucked beneath her chin. The evidence indicated that the victim struggled before she was killed, causing her to bleed. Defendant's blood was found on the victim's pillowcase. When defendant was arrested later that day, he had scratches on his right forearm. The victim's wedding ring and purse were found in the victim's van parked in the driveway. While in jail, defendant stated to a guard that he killed his wife.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational jury to find beyond a reasonable doubt that defendant murdered the victim with premeditation and deliberation. Moreover, the verdict was not against the great weight of the evidence.

VII

Lastly, we reject defendant's claim that the prosecutor denied him a fair trial because of misconduct during closing argument. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Although the prosecutor improperly commented on defendant's exercise of his right to remain silent, *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973), the trial court sustained defense counsel's objection to the challenged remark. Further, the court instructed the jury that defendant had the right to remain silent and that his silence could not be used against him. Thus, it is not more probable than not that the prosecutor's improper statement was outcome determinative or resulted in a miscarriage of justice. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

The prosecutor's remarks regarding DNA testing were responsive to defense counsel's remarks attacking the validity of the DNA on the ground that only eight of the twenty bloodstains were tested. Considered in this context, they were not improper. Further, any perceived error was cured by the trial court's proper instructions concerning the burden of proof.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra